



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

March 31, 1999

Jeffrey C. Barbakow, CEO  
Tenet Healthcare Corporation  
3820 State St.  
Santa Barbara, CA 93105

RE: MUR 4886

Dear Mr. Barbakow:

On March 23, 1999, the Federal Election Commission found that there is reason to believe Tenet Healthcare Corporation violated 2 U.S.C. § 441b(a), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved.

If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Thomas Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures

Factual and Legal Analysis  
Procedures  
Designation of Counsel Form  
Conciliation Agreement

# FEDERAL ELECTION COMMISSION

## FACTUAL AND LEGAL ANALYSIS

MUR 4886

RESPONDENT: Tenet Healthcare Corporation

### **I. GENERATION OF MATTER**

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2).

### **II. FACTUAL AND LEGAL ANALYSIS**

#### **A. Applicable Law**

The Federal Election Campaign Act of 1971, as amended ("Act"), prohibits a corporation from making contributions or expenditures in connection with any Federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). Section 441b(a) further prohibits any political committee to knowingly accept such a contribution. *See also* 11 C.F.R. § 114.2(d). The term "contribution or expenditure" shall include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any" Federal election. 2 U.S.C. § 441b(b)(2). *See also* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. §§ 114.1(a)(1) and 100.7(a)(1).

The Act states, however, that the term "contribution or expenditure" does not include "the establishment, administration, and solicitation of contributions to a separate segregated fund ("SSF") to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C). *See also* 2 U.S.C. § 431(8)(B)(vi) and (9)(B)(v); 11 C.F.R. § 114.1(a)(2)(iii).

A trade association is defined at 11 C.F.R. § 114.8(a) as “a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.” *An incorporated trade association or its SSF is permitted to solicit contributions from the stockholders and executive or administrative personnel, and their families, of the association’s member corporations, provided that the member corporation involved has separately and specifically approved the solicitation and has not approved a solicitation by any other trade association for the same calendar year.* 2 U.S.C. § 441b(b)(4)(D); 11 C.F.R. § 114.8(c)(1)-(2). The member corporation must grant such approval in writing prior to any solicitation of its stockholders and executive or administrative personnel. 11 C.F.R. § 114.8(d)(1)-(3). The request for approval may be addressed to the designated representative of the member corporation with whom the trade association regularly corresponds. Once authorization is granted, the association or its SSF may solicit the person approved by the member corporation. 11 C.F.R. § 114.8(e).

A collecting agent may pay any or all of the costs incurred in soliciting and transmitting contributions to an SSF to which it is related. 11 C.F.R. § 102.6(c)(2)(i); AOs 1998-25 and 1998-19. A collecting agent is defined in 11 C.F.R. § 102.6(b) as

an organization or committee that collects and transmits contributions to one or more [SSFs] to which the collecting agent is related. A collecting agent may be either:

- (i) A committee, whether or not it is a political committee as defined in 11 C.F.R. § 100.5, affiliated with the [SSF] under 11 C.F.R. § 110.3; or
- (ii) The connected organization of the [SSF] as defined in 11 C.F.R. § 100.6; or

(iii) The parent, subsidiary, branch, division, department, or local unit of the connected organization of the [SSF]; or

(iv) A local, national or international union collecting contributions on behalf of the [SSF] of any federation with which the local, national or international union is affiliated. *See* 11 C.F.R. § 114.1(e).

11 C.F.R. § 102.6(b)(1)(i)-(iv).

## **B. Factual Background**

Tenet Healthcare Corporation ("Tenet Healthcare") is a nationwide provider of health care services.<sup>1</sup> Tenet Healthcare Corporation Political Action Committee ("TenetPAC") is its separate segregated fund ("SSF") and a qualified multicandidate committee. Tenet Healthcare is a member of the Federation of American Health Systems ("Federation"), a non-profit, incorporated national trade organization that represents nearly 1,700 owned and managed hospitals and health care systems. The Federation of American Health Systems Political Action Committee ("FedPAC") is the Federation's SSF and a qualified multicandidate committee.<sup>2</sup>

In Schedule B of its 1997 Year End Report, TenetPAC disclosed a \$5,000 contribution on October 23, 1997 and a \$35,350 contribution on December 22, 1997, to FedPAC. The latter contribution was described as "FedPAC – Earmarked Contributions solicited through

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<sup>1</sup> According to its website, Tenet Healthcare owns or operates 128 acute care hospitals and related businesses in 18 states through its subsidiaries. Tenet Healthcare is headquartered in Santa Barbara, CA, and employs approximately 130,000 people nationwide. <<http://www.tenethealth.com>> (accessed Jan. 5, 1999). A recent Dun & Bradstreet search revealed that Tenet Healthcare is the second largest investor-owned healthcare services company in the United States.

<sup>2</sup> In its website, the Federation states that the purpose of FedPAC

is to support the election to Congress of candidates who understand the contributions of privately owned community hospitals and health systems and support a market driven approach to the nation's health care delivery system. FedPAC supports candidates interested in legislation that ensures that the private sector continues its essential role in providing quality care to the American people.

<[http://www.fahs.com/public/publications/a\\_rep/about/html](http://www.fahs.com/public/publications/a_rep/about/html)> (accessed Jan. 5, 1999).

TenetPAC.” In Schedule A of its Report, TenetPAC disclosed contributions received from 29 executives of Tenet Healthcare. These contributions, ranging from \$500 to \$3,000 and totaling \$36,600, were each described as “earmarked for FedPAC.” FedPAC, in its 1997 December and Year End Reports, disclosed a \$5,000 contribution from TenetPAC as being received on November 13, 1997, and a \$35,350 contribution from TenetPAC on December 31, 1997.<sup>3</sup>

FedPAC did not provide any further description or itemization of the \$35,350 contribution.

On February 18, 1998, the Reports Analysis Division (“RAD”) sent a Request for Additional Information (“RFAI”) to FedPAC regarding its 1997 Year End Report, notifying the committee that it had received an excessive contribution. The RFAI advised FedPAC to clarify if the contribution was incorrectly disclosed, and to transfer out or refund the amount in excess of \$5,000. By letter dated February 24, 1998, FedPAC responded that it had “miscategorized” the \$35,350 contribution as having been received directly from TenetPAC, when in fact it consisted of “individual contributions sent to TenetPAC but which were earmarked for FedPAC.” FedPAC contended that the “retribution rules contained in 11 C.F.R. § 110.1(k) permit these contributions to be treated as if they had been made directly to FedPAC.” The response included a list of the original 27 donors and the amount of their “earmarked” contributions.

On February 25, 1998, RAD sent an RFAI to TenetPAC regarding its 1997 Year End Report, stating that TenetPAC had made contributions to FedPAC in excess of \$5,000 per calendar year. The RFAI recommended that TenetPAC clarify if the contributions were

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<sup>3</sup> There is a \$1,250 discrepancy between the \$35,350 contribution to FedPAC reported by TenetPAC and the sum of the individual contributions received by TenetPAC (\$36,600). This discrepancy appears to have resulted from two contributions received by TenetPAC during the reporting period (\$500 from Anthony P. Whitehead on December 23, 1997, and \$750 from Michael W. Gallo on December 29, 1997), but forwarded to FedPAC in January 1998.

incorrectly disclosed, or notify the recipient and request a refund of the amount in excess of \$5,000. On March 5, 1998, TenetPAC responded that it had been "‘earmarking’ contributions to FedPAC for a number of years. Prior to TenetPAC beginning this ‘earmarking,’ we spoke with someone from the . . . Commission to ensure that it was being done properly and legally." On March 16, 1998, Charles H. Bell, Jr., an attorney responding via facsimile on behalf of TenetPAC, stated that TenetPAC "had responded to a similar inquiry [in 1997] and had received no response indicating that the explanation given was inadequate, and had, justifiably, believed that response and explanation had been accepted." Attached to the letter was the same list of 27 donors submitted by FedPAC on February 24, 1998.

On April 17, 1998, a Second Notice was sent to FedPAC advising it to specify the method used by TenetPAC to solicit the contributions and to include a copy of the original solicitation. On April 23, 1998, Tom Scully, President and CEO of the Federation, called RAD and stated that the Federation is a trade group made up of corporations, some of which have their own SSFs. The SSFs receive funds from individuals, but may verbally suggest that the contributors can make contributions to FedPAC, either directly or through the SSF. On May 4, 1998, FedPAC submitted a written response mistakenly stating that a \$35,700 contribution disclosed on its 1997 December Monthly Report was received in the form of a single check from TenetPAC, consisting of amounts collected by TenetPAC from "senior employees at Tenet Healthcare who had chosen to earmark them" for FedPAC.<sup>4</sup> FedPAC's amended 1997 December Monthly Report, received on May 4, 1998, showed \$35,350 in contributions from

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<sup>4</sup> FedPAC's original 1997 December Monthly Report showed no such contribution; the contribution referred to would appear to be the \$35,350 receipt from TenetPAC disclosed in FedPAC's 1997 Year End Report, which covered activity occurring in December 1997.

Tenet Healthcare executives.

On May 6, 1998, two analysts from RAD met with Mr. Scully to discuss the contributions at issue. Mr. Scully provided copies of some checks from Tenet Healthcare executives to TenetPAC, which represented contributions "earmarked" for FedPAC. The checks contain notations such as "[m]ay be earmarked for FedPAC." Mr. Scully explained that Tenet Healthcare did not allow FedPAC to solicit its executives directly. Instead, Tenet Healthcare agreed to solicit its members on behalf of FedPAC in order to reach an annual contribution goal of \$35,000. Mr. Scully further explained that he informs the board of directors of a member corporation that FedPAC needs money and that it is time to meet the contribution goal arranged by FedPAC and the corporation. The RAD analysts reiterated the need to clarify TenetPAC's solicitation method, preferably including a copy of the solicitation.

On May 20, 1998, Mr. Bell submitted a response on behalf of TenetPAC which confirmed that the \$35,350 contribution was sent by TenetPAC to FedPAC in the form of a single check from TenetPAC. Attached to the response was a "boilerplate version of the TenetPAC solicitation that was sent to [Tenet Healthcare] employees" from Michael H. Focht, President of Tenet Healthcare. On June 22, 1998, FedPAC submitted an amended 1997 Year End Report showing the receipt of \$35,350 from TenetPAC and listing, as memo entries, 27 individual contributions comprising that amount. The individuals involved were the same Tenet Healthcare executives identified as donors in FedPAC's response to RAD's February 24, 1998 RFAI.



### C. Analysis

The Act's prohibition on corporate contributions would appear to apply to the solicitation of Tenet Healthcare executives on behalf of FedPAC. As previously stated, a contribution under § 441b includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or *any services, or anything of value . . . to any candidate, campaign committee, or political party or organization*, in connection with any election to any" Federal election. 2 U.S.C. § 441b(b)(2) (emphasis added). The Commission's regulations further explain that corporations and their representatives are "prohibited from facilitating the making of contributions to candidates *or political committees, other than to the [SSFs] of the corporations . . .*" 11 C.F.R. § 114.2(f)(1) (emphasis added). The provision of services to assist the Federation in raising money for its SSF is something of value and would appear to be prohibited by the Act and regulations. *See also* AO 1983-18.

The available information indicates that the 1997 contributions here at issue were a direct result of solicitations by Tenet Healthcare on behalf of FedPAC, pursuant to a predetermined contribution goal agreed upon by Tenet Healthcare and the Federation. A total of 27 Tenet Healthcare executives appear to have responded to these solicitations by making checks out to TenetPAC in amounts ranging from \$500 to \$3,000. These checks, containing such notations as "[m]ay be earmarked for FedPAC," were apparently collected by Tenet Healthcare personnel and deposited into TenetPAC's account between November 7 and December 22, 1997. When the amount reached the target level of \$35,000 on December 22, TenetPAC sent a check for the total amount of contributions (\$35,350) to FedPAC. The solicitation, collection, processing and transmittal of these funds would appear to constitute an in-kind contribution by Tenet Healthcare

to FedPAC. TenetPAC's and FedPAC's disclosure reports do not indicate any payments or reimbursements in connection with these activities.

As stated above, an exception to the Act's broad prohibition on corporate contributions and expenditures – the costs of establishing, administering and soliciting contributions to a corporation's SSF – permits a corporation to use its general treasury funds to pay for such costs associated *with its own* SSF. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). The Commission's regulations have interpreted the SSF exception to allow a "collecting agent" to collect and transmit contributions to an SSF to which the collecting agent is related. 11 C.F.R. § 102.6(c)(2); AOs 1998-25 and 1998-19.

Tenet Healthcare and its SSF do not, however, appear to meet the narrowly drafted criteria for qualifying as collecting agents for the Federation. 11 C.F.R. § 102.6(b)(1)(i)-(iv). First, the available information indicates that TenetPAC and FedPAC are not "affiliated" as that term is defined in the regulations. 11 C.F.R. § 102.6(b)(1)(i). Neither committee lists the other as an affiliated committee in their Statements of Organization, and the relationship between their "sponsoring organizations" – the Federation and Tenet Healthcare – does not appear to extend beyond that of a trade association with one of its member corporations. 11 C.F.R. § 110.3. Second, Tenet Healthcare is clearly not the connected organization of the Federation's SSF as defined in 11 C.F.R. § 100.6. 11 C.F.R. § 102.6(b)(1)(ii). FedPAC's Statement of Organization lists only the Federation as its connected organization; further, Tenet Healthcare does not appear to administer or financially support FedPAC, even though it may pay membership dues to the Federation. *See* 11 C.F.R. § 100.6(a). As stated in § 100.6(b), "organizations which are members of the entity (such as corporate members of a trade association) which establishes, administers, or financially supports a political committee are *not* organizations which directly or

indirectly establish, administer, or financially support that political committee” (emphasis added). Third, Tenet Healthcare appears to be an independent business rather than a “parent, subsidiary, branch, division, department, or local unit” of the Federation. 11 C.F.R.

§ 102.6(b)(1)(iii). Its status as an organizational member of the Federation does not *qualify* it as a “unit” of the Federation for purposes of the regulation. *See* AOs 1985-37 and 1989-3, fn. 2.

*Cf.* AO 1998-19. Finally, 11 C.F.R. § 102.6(b)(1)(iv) does not apply in this matter as Tenet Healthcare is an incorporated organization rather than a union affiliate.

Therefore, there is reason to believe that Tenet Healthcare Corporation violated 441b(a).